

**AMERICAN ARBITRATION ASSOCIATION**

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In the Matter of the Arbitration Between

**FRATERNAL ORDER OF POLICE,  
LODGE #5**

**OPINION & AWARD**

**Case No. 14-20-1300-0460  
(P/O Ernest Lawyer)**

-- and --

**CITY OF PHILADELPHIA**

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**ARBITRATOR:** James M. Darby, Esq.

**APPEARANCES:** For the FOP:  
Mark L. Gelman, Esq.  
Jennings Sigmond, P.C.

For the City:  
Christian Kerstetter, Esq.  
Staff Attorney

This case arose when the City of Philadelphia (“the City”) Police Department (“the Department”) terminated Ernest Lawyer (“the Grievant”) for conduct unbecoming. The Fraternal Order of Police, Lodge #5 (“the Union”) filed a grievance alleging that the City’s discipline action lacked just cause.

By letter dated May 9, 2013, from the American Arbitration Association (“AAA”), the undersigned was notified of his selection as Arbitrator of this

dispute.<sup>1</sup> A hearing was held on September 23, 2014, at the AAA offices in Philadelphia, Pennsylvania, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The parties presented oral closing arguments in lieu of filing post-hearing briefs, and the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

### **QUESTIONS TO BE RESOLVED**

At the hearing, the parties stipulated to the following issue to be resolved by the Arbitrator:

Whether the City had just cause to terminate the Grievant, Ernest Lawyer? If not, what shall the remedy be?

### **REMEDY REQUESTED**

The Union requests that the grievance be sustained, that the Grievant be reinstated and made whole, that his discipline be expunged from his record, and that the Arbitrator retain jurisdiction for purposes of resolving any remedial disputes.

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<sup>1</sup> The undersigned was originally selected to arbitrate the Grievant's unrelated suspension, but the parties subsequently agreed to have him handle the instant termination case.

### **BACKGROUND**

The Grievant has been a police officer with the Department since January 22, 1996. Effective June 19, 2014, the Department terminated the Grievant's employment for conduct unbecoming. Specifically, the Notice of Discipline states as follows:

On Tuesday, August 20, 2013, approximately 9:51 PM, Sergeant W [REDACTED] S [REDACTED] responded to the scene of an auto accident at Tioga Street and Old York Road. You were off duty when you approached Sergeant S [REDACTED] at this location to complain about an incident which occurred the previous day, on Monday, August 19, 2013, during which Sergeant S [REDACTED] arrested your wife, V [REDACTED] L [REDACTED]. You threatened Sergeant S [REDACTED] and when Sergeant S [REDACTED] attempted to arrest you, you tried to assault him. Sergeant S [REDACTED], while defending himself, punched you in the mouth and arrested you.

\* \* \*

On Thursday, November 21, 2013, you were interviewed by Internal Affairs in reference to an investigation into an incident between you and Sergeant W [REDACTED] S [REDACTED] on August 20, 2013, at Old York Road and Tioga Street. You lied or attempted to deceive during this interview.

By your actions, you have indicated that you have little or no regard for your responsibility as a member of the Philadelphia Police Department. Therefore, you will be dismissed after being placed on a thirty day suspension.

\* \* \*

(Joint Exhibit 5.)

S [REDACTED] testified that while he was responding to an automobile accident on August 20, 2013, the Grievant's wife approached him and said: "Hey tough guy. Learn your lesson yet?" He stated further that she also told him "you'll learn your lesson now." Soon thereafter the Grievant arrived. According to S [REDACTED],

the Grievant said as follows: “That was some bitch shit. That was my wife you locked up. You didn’t have to fuck her up. Better be lucky you have your uniform on. I would fuck you up.” Two other officers – K [REDACTED] G [REDACTED] and O [REDACTED] T [REDACTED] – then arrived at the scene to assist S [REDACTED] with the accident scene.

S [REDACTED] testified that he decided to arrest the Grievant. He told G [REDACTED] and T [REDACTED] (who were still in their patrol car) to “cut the Grievant off” as he was walking away. S [REDACTED] then approached the Grievant on foot. When he told the Grievant he was going to arrest him the Grievant backed up to a wall and said: “You ain’t doing shit. You can try.” According to S [REDACTED] the Grievant “balled his fist and became extremely aggressive.” He testified that the Grievant had the smell of alcohol on his breath.

S [REDACTED] testified that he directed T [REDACTED] to grab the Grievant’s arm. When he did this the Grievant pulled away and “put his arms up in a boxer’s stance.” S [REDACTED] testified that he then hit the Grievant in the face and “took him down to the ground.” S [REDACTED] stated further that the Grievant “struggled on the ground for 20 seconds” and then S [REDACTED] handcuffed him. T [REDACTED] and G [REDACTED] drove the Grievant to Episcopal Hospital.

On cross-examination S [REDACTED] testified that he is T [REDACTED]’s and G [REDACTED]’s superior officer. S [REDACTED] averred that the Grievant told him: “That was some bitch shit. That was my wife you locked up. Lucky you have your uniform on. If I ever catch you off-duty I’ll fuck you up.” He added that when the Grievant first

confronted him with threats he was five feet away, and then he continued to make threats as he was walking away. S█████ decided to arrest the Grievant while he was walking away and when G█████ and T█████ arrived. He testified that the Grievant committed a crime by threatening a uniformed officer.

S█████ stated that he is aware that the Grievant was not charged with any crime arising out of his encounter with S█████. He reiterated that after he told the Grievant he was going to “lock him up,” the Grievant refused to be handcuffed and “let me know he would not do it without a fight.” S█████ hit the Grievant because he is a “big guy” and he did not want to “wait for him to hurt us.”

S█████ testified that he has been investigated in the past for using excessive force. He added that after he hit the Grievant he became disoriented and “we took him to the ground.” The Grievant’s face hit the pavement and several of his teeth fell out and he was bleeding. S█████ averred that he could have allowed the Grievant to walk away and arrested him later. He added that had the Grievant not resisted arrest the incident would have never escalated.

G█████ testified that when he arrived at the scene the Grievant was refusing S█████’s order to get down and using profanity. He stated that the Grievant “took a boxer’s stance” when S█████ and T█████ attempted to grab his arms. S█████ then hit the Grievant in the face and he lost consciousness and fell towards them. G█████ said that the Grievant smelled of alcohol.

On cross-examination, G [REDACTED] testified that he did not know the Grievant was an off-duty police officer at the time of the incident. He stated that the Grievant stopped walking away when S [REDACTED] told him to stop and get on the ground. The Grievant then stated "Fuck you I'm not getting on the ground." G [REDACTED] averred that the Grievant "was ready to fight us." He did not recall the Grievant saying "you ain't locking me up ... try if you want."

T [REDACTED] testified that when he arrived on the scene with G [REDACTED] the Grievant was cursing at S [REDACTED]. The Grievant stopped walking away when told to do so and also complied when told to put his hands on the porch of a nearby house. However, T [REDACTED] stated that the Grievant refused to get on the ground to be handcuffed. T [REDACTED] grabbed the Grievant's left hand and he broke away and "got into a fighting stance." S [REDACTED] punched the Grievant and he fell to the ground. The officers handcuffed the Grievant and he stood up and called S [REDACTED] a "bitch." T [REDACTED] added that the Grievant smelled of alcohol.

On cross-examination T [REDACTED] testified that when he arrived at the scene the Grievant was walking away from S [REDACTED] but still cursing at him. He did not hear the Grievant making threats. According to T [REDACTED], the Grievant was cooperating but continued to yell at S [REDACTED]. The Grievant refused S [REDACTED]'s order to get on the ground, telling him "fuck you bitch." T [REDACTED] averred that he never heard the Grievant state that he would not be arrested or "wasn't going to be locked up." He added that the Grievant "was out of it for a few seconds" after

S■■■■ hit him. T■■■■ also testified that he believed based on the Grievant's words and body language that the Grievant was about to become violent.

Internal Affairs ("IA") Lieutenant Raymond Saggese investigated the foregoing incident. He concluded that the Grievant violated the Department Discipline Code by verbally threatening a uniformed officer and lying during the investigation.<sup>2</sup> Regarding the latter charge, Saggese testified that the Grievant's wife told him that she told the Grievant in advance that S■■■■ was at the accident scene. The Grievant told him that she did not tell him that and that he came upon S■■■■ while he was looking for his wife and saw the police lights. Additionally, Saggese stated that the Grievant lied when he denied taking a fighter's stance, contrary to the statements of S■■■■, G■■■■ and T■■■■.

On cross-examination, Saggese testified that a number of individuals were interviewed, including civilians, but no one corroborated S■■■■'s claim that the Grievant threatened him. He added that S■■■■ mishandled the situation with the Grievant. In this regard, the IA Report of this incident states as follows:

Note: Sgt. S■■■■ could have handled the situation with P/O Lawyer differently and could have simply allowed P/O Lawyer to walk away as Officers T■■■■ and G■■■■ described seeing when they first arrived. Sgt. S■■■■ could have prepared a departmental memo describing the language and threats used by P/O Lawyer, giving note to Lawyer being understandably upset due to his wife's arrest and mental condition. Had Sgt. S■■■■ simply de-escalated this situation, this incident would not have risen to the point where

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<sup>2</sup> The Grievant was charged with violating Article I (Conduct Unbecoming) of the Department Disciplinary Code; specifically, 1-§001-10 (Unspecified) and 1-§009-10 (Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation) (Joint Exhibit 2).

profanity was used, which resulted in Sgt. S [REDACTED] having to arrest Lawyer.

Additionally, Sgt. S [REDACTED] has a penchant for utilizing force in the form of punching suspects in their face causing injury, as documented in his Internal Affairs history. In this particular case, Lawyer suffered injury to his mouth, and S [REDACTED] suffered cuts to his right hand as a result of punching Lawyer in his teeth.

Sgt. S [REDACTED]'s supervisory decision to engage Lawyer rather than let him walk away should be questioned, as it set a chain of events in motion, which include arrest, resisting arrest, use of force, medical treatment, and a police investigation, which has resulted in Lawyer lying.

(City Exhibit 5.)

The Grievant testified that S [REDACTED] arrested his wife ( [REDACTED] ) for disorderly conduct on August 19, 2013. He stated that the next day he was on his porch and saw red and blue patrol car lights about a block and a half away. The Grievant walked to the scene where a car accident had been cleared away, and saw S [REDACTED] leaning against the patrol car. According to the Grievant, he told S [REDACTED] "that was messed up what you did last night." S [REDACTED] responded "fuck you," and the Grievant said "fuck you" back. The Grievant added that he kept on walking and S [REDACTED] made insulting comments about the Grievant's neighborhood and house. He averred that he never threatened S [REDACTED] and walked away from the scene.

When the Grievant got about 20 yards away from S [REDACTED], T [REDACTED]'s and G [REDACTED]'s patrol car pulled up to him and told him to stop. The Grievant complied. The officers approached him and the Grievant saw S [REDACTED] running



towards him carrying his asp in his hand. The Grievant testified that S [REDACTED] stated to him: "Pick one. The hospital or jail." S [REDACTED] went to grab the Grievant's left hand and the Grievant pulled his hand up and away. The Grievant stated that his hand could have looked like a fist at that time. At that point, T [REDACTED] and G [REDACTED] grabbed the Grievant and he felt two punches. The Grievant stated that "we all fell to the ground."

The Grievant denied assuming a boxer's stance, stating that he "had no time to." He also denied that he was aggressive or resisted arrest. The Grievant testified further that S [REDACTED] never told him that he was being arrested or handcuffed or directed him to get on his knees. He denied saying "don't touch me" or "try to do it [arrest him]." The Grievant stated that he briefly "blacked out" and that no one prevented him from hitting the ground face first. After being treated at the hospital, he was kept in a holding cell for five hours without being charged. The Grievant testified that he lost a tooth and suffered several fractured teeth, which has required extensive dental work.

On cross examination, the Grievant testified that on the night in question he and his wife went to dinner and returned to their house. His wife then left the house for a few minutes. He denied that his wife returned to the house and told him that S [REDACTED] was down the street (as she stated to Internal Affairs in her interview). The Grievant also averred that he had no time to think when S [REDACTED] stated "the hospital or jail" and reflexively pulled his hand away when S [REDACTED]

attempted to grab it. He testified that S [REDACTED] punched him in the face two times. When reminded that he told Internal Affairs that he was punched one time in the face, the Grievant replied that either way S [REDACTED]'s conduct was egregious.

On redirect, the Grievant testified that his wife [REDACTED] and that he is concerned for her safety whenever she leaves the house. He added that he did not see S [REDACTED] hit him twice. The Grievant also stated that he never punched S [REDACTED] or Officers T [REDACTED] and G [REDACTED].

### **DISCUSSION**

The parties' positions can be briefly summarized.

**The City** maintains that it had just cause to terminate the Grievant for conduct unbecoming and for lying to Internal Affairs. It argues that the Grievant is not credible, as evidenced by the conflicting versions of the event given by him and his wife. The City dismisses any credibility issue arising out of S [REDACTED] testifying that the Grievant "continued to struggle" on the ground, while T [REDACTED] and G [REDACTED] claimed he "was unconscious." This is not a meaningful distinction and under these extreme circumstances it could have appeared to S [REDACTED] that the Grievant was still fighting.

The City also maintains that IA's comments about S [REDACTED]'s behavior do not excuse the Grievant's actions. In any event, the Grievant's lying about the

confrontation “compounded” his misconduct. The City urges the undersigned not to “go out on a limb” for the Grievant in the face of the strong evidence supporting a finding of just cause. For these reasons, the City maintains that the grievance must be denied and the discipline upheld.

**The Union** asserts that the City’s evidence is circumspect, inasmuch as T [REDACTED] and G [REDACTED] report to S [REDACTED] and the three of them are “joined at the hip.” It emphasizes that while all three officers consistently recalled the Grievant assuming a “boxer’s stance,” their stories were inconsistent when they were forced to “go outside the script.” For example, T [REDACTED] and G [REDACTED] could not corroborate S [REDACTED]’s version that the Grievant continued to struggle after falling to the ground.

The Union also submits that S [REDACTED] embellished his version of the incident by claiming that the Grievant told him “you ain’t locking me up,” which was not corroborated by the other officers. It points out that according to T [REDACTED] the Grievant complied when directed to do so. The Union questions that if S [REDACTED] was willing to embellish his version of the event in this regard, it is likely he was also untruthful when claiming that the Grievant repeatedly threatened him. S [REDACTED] could have prevented this entire incident from occurring, but he obviously “snapped” after he and the Grievant exchanged obscenities. The Union maintains that “this entire incident was the result of S [REDACTED]’s conduct.”

Finally, the Union argues that notwithstanding S█████'s serious allegations, no criminal charges were ever filed against the Grievant. It maintains that for this reason the City was forced to focus on the Grievant's alleged lying, which even if proved, is not a dischargeable offense. For all of these reasons, the Union asserts the grievance should be sustained.

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The undersigned must determine whether the City had just cause to terminate the Grievant for conduct unbecoming, including lying during his IA interview.

The dishonesty charge is based on the City's determination that the Grievant lied to IA about whether his wife informed him in advance that S█████ was in their neighborhood and that he was dishonest about his role in the altercation with S█████, T█████ and G█████. It hinges exclusively on credibility resolutions the City made in favor of S█████, T█████, G█████ and the Grievant's wife.<sup>3</sup> The City has not presented any independent, uncontraverted proof that the Grievant was lying. Rather, it simply chose to discredit the Grievant's version of what took place during the August 20, 2013, incident.

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<sup>3</sup> The Grievant's wife did not testify at the hearing.

Whereas here there is an absence of clear, undisputed “smoking gun” evidence that the Grievant was lying when he gave his version of the incident to IA, I am unwilling to allow the City to bootstrap a charge of dishonesty. To sustain such a charge would countenance the City firing officers for merely “telling their side of the story” where it differs from other witnesses’ accounts. This would improperly “chill” police officers’ constitutional right to defend themselves and to have an adequate opportunity to respond to disciplinary charges.

With respect to the alleged threat and assault on S [REDACTED], the record contains numerous discrepancies in all of the versions presented by the parties.

According to the Grievant, he encountered S [REDACTED] by happenstance when looking for his wife, while S [REDACTED] was handling a car accident in the Grievant’s neighborhood. He contends he merely cursed at S [REDACTED] and S [REDACTED] responded by punching the Grievant in the face, throwing him to the ground and arresting him for assault. This testimony is difficult to believe, in light of the evidence that S [REDACTED] had arrested the Grievant’s wife the night before and the Grievant was still extremely upset about this. The Grievant clearly had a motive to locate and verbally assault S [REDACTED], and the undisputed evidence that he had been drinking before the incident only added fuel to the situation.

With respect to S [REDACTED]’s account of the incident, the record shows that he gave inconsistent accounts of the specific threats the Grievant allegedly made

towards him. Additionally, S [REDACTED] wants the undersigned to believe that he and two other officers were unable to subdue the Grievant without first punching him in the face, allowing him to fall face first to the pavement and sending him to the emergency room. Given S [REDACTED]'s history of using excessive force with suspects, he clearly had a motive to overstate the Grievant's aggressiveness and downplay his own violent behavior. No one else heard the Grievant's alleged threats and T [REDACTED] and G [REDACTED] disputed S [REDACTED]'s claim that the Grievant continued to struggle after he fell to the ground. Moreover, the Grievant was never criminally charged with the crime S [REDACTED] arrested him for committing.

Thus, based on a careful review of the record evidence the undersigned concludes that the truth probably lies somewhere in between these differing versions. I find that it is more likely than not the Grievant went looking for S [REDACTED] and upon finding him verbally assaulted/abused him. In response, S [REDACTED] escalated the situation by deciding to arrest the Grievant and the Grievant (feeling he did nothing wrong) became aggressive and resisted arrest. S [REDACTED] then knocked the Grievant to the ground with a punch to the face, causing the Grievant to hit the pavement face first.

The Grievant's actions in seeking out S [REDACTED], verbally assaulting him and resisting arrest clearly constituted conduct unbecoming an officer.

In considering whether termination was appropriate, it cannot be overlooked that S [REDACTED]'s actions escalated what should have been a mere

profane shouting match between he and the Grievant. Rather than allow a fellow off-duty police officer to continue to walk away after he verbally assaulted S [REDACTED], S [REDACTED] imprudently decided to arrest the Grievant. When this caused the Grievant to become aggressive, S [REDACTED] used excessive force resulting in the Grievant needing emergency medical care and substantial dental work. Certainly from the Grievant's perspective, he has already been severely punished for his irresponsible attempt to resist arrest.

Based on the totality of all of the foregoing circumstances, the undersigned concludes that the Grievant's actions, while warranting serious discipline, did not justify his termination. The Grievant shall be reinstated and his termination shall be converted to a suspension without pay for time served. Any further violations of the Department's Discipline Code shall be grounds for the Grievant's termination. The undersigned will retain jurisdiction for 60 days in order to resolve any disputes that may arise out of the implementation of this remedy.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

**AWARD**

The grievance is sustained in part and denied in part.

The City did not have just cause to terminate the Grievant, Ernest Lawyer. The City shall immediately reinstate the Grievant and convert his termination to a suspension without pay for time served. Any further violations of the Department's Discipline Code shall be grounds for the Grievant's termination. The undersigned will retain jurisdiction for 60 days in order to resolve any disputes that may arise out of the implementation of this remedy.

A handwritten signature in black ink, appearing to read 'James M. Darby', written over a horizontal line.

JAMES M. DARBY  
Arbitrator  
Lancaster, Pennsylvania  
April 23, 2015